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No. 05-254

In The
Supreme Court of the United States

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

REPLY BRIEF FOR TRAVIS COUNTY APPELLANTS

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REPLY BRIEF FOR TRAVIS COUNTY APPELLANTS

I. The state's opportunistic re-jiggering of congressional district lines, while under no legal compulsion to act, was not in furtherance of a "reasonably conceived plan" for periodic redistricting that *Reynolds v. Sims* requires in order for the state to be afforded the safe harbor of the decennial census under the equal population rule.

The state insists that keeping two sets of redistricting books is a perfectly legitimate practice in constitutional accounting. One set of books is for the politicians. It reflects the contemporary demographic realities indicated by recent election results and voting trends, informed by detailed political insights into current population developments. The other set of books is for the courts, brought off the shelf when the constitutional auditors arrive. This set of books is known to paint an artificial picture of demographic reality, but, since it tallies correctly down to the penny, the state winks at the auditors, seeking momentary indulgence before the second set of books is put back on the shelf to gather dust until the next audit.

There is no doubt that Texas takes precisely this approach in defense of its brash and unique voluntary redistricting endeavor in 2003. It does assay a meek suggestion that trial evidence shows no more than legislative attention to contemporary "political shifts" instead of to contemporary population realities. State Br. at 65 (where state can only bring itself to assert that "bulk" of record evidence is about attention to current politics, not current population). Even this carefully hedged suggestion

is off-base. To the practiced political eye – and the legislative proponents of Plan 1374C had near-perfect vision[1] – the most recent election results and the voting patterns underlying them are strong indicia of demographic shifts, particularly in this era where voters' party loyalties are increasingly entrenched. *See* G. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 13-16 (2003) (increased predictability of partisan voting patterns).

Moreover, as recounted in detail in our opening brief, Travis County Appellants Br. at 6-9, the record contains ample evidence of attention to actual contemporary patterns of shifting populations as the legislature devised Plan 1374C. The state admits that there is testimony about population, though it tries to diminish its force by tossing it off as "snippets of testimony." State Br. at 65. "Snippets" or not, the record plainly shows acute political attention to current demographic patterns in drawing Plan 1374C's lines.[2] All the while, the state concedes that it made no effort to determine current populations for constitutional purposes, but instead relied solely on the 2000 decennial census, Stip. 85, disregarding the huge and uneven population surges of the interceding three years, Travis County/City of Austin Exh. 1.

In implicit tribute, the state ignores altogether the argument that *Reynolds v. Sims*, 377 U.S. 533 (1964), presages the core rationale for dispensing with the legal

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[1] The 2004 election results proved that Plan 1374C hit its target. Only Congressional District 17 failed to pan out, when Congressman Chet Edwards held his seat in 2002.

[2] This awareness was brought to bear with particular force in drawing Districts 4, 12, 23, and 30.

fiction of inter-census population stability in the circumstances attending Plan 1374C's passage. As we argued in the opening brief, Travis County Appellants Br. at 14, 20-21, and 22, the Court offered the states protection from constant exposure to constitutional challenges that the vicissitudes of population have rendered legislative redistricting violative of the equal population rule. In recognition of the "need for stability and continuity" in legislative configurations, the Court absolved states from "daily, monthly, annual or biennial" redistricting to comply with the equal population rule as population disequilibrium set in. 377 U.S. at 583. But, there was a catch. This absolution comes only if there is a "reasonably conceived plan for period readjustment" of district lines. *Id.*[3]

Texas offers nothing in its brief to suggest that its historically unique "readjustment" of congressional lines in 2003 was the product of a "reasonably conceived plan"

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[3] The *Reynolds v. Sims* principle underlying the constitutional challenge here belies the state's assertion that the claim has "little to do with traditional one-person, one-vote claims." State Br. at 57 n.75. True, the equal population issue has not arisen in precisely this way before, but, still truer, this kind of redistricting has not been tried before either. In a sense, Texas's unprecedented effort returns the one person, one vote rule to its roots as a meaningful check on official actions by elected officials that tend to induce rigor mortis in the democratic institution that is supposed to be the most answerable to the electorate. Respectable commentators have criticized the origins of the equal population rule, leveling the charge that one person, one vote freed legislative line-drawers to "render[ ] elections less a reflection of popular opinion than of legislative craftsmanship." M. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. JOURNAL OF LAW AND PUBLIC POLICY 103, 103-04 (2000). Robust application of the one person, one vote rule in this case, though, reaches and corrects the very problem such comments understandably but mistakenly assume the rule furthers. Things sometimes come full circle; this is one of those times.

for adjusting lines for Texas congressional seats. The structure of the Texas Constitution, in fact, suggests that the 2003 effort contravened the state constitutional plan for redistricting. While the state constitution does not advert to congressional redistricting at all, much less to timing matters, it does speak directly to the redistricting of the state House and Senate. Article III, Section 28, of the Texas Constitution establishes a judicially enforceable mechanism that compels redistricting of those seats decennially, between issuance of the census and the first round of elections afterwards. *See Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971). This arrangement does not *compel* congressional redistricting to follow the same pattern, but it suggests a broader state interest in linking the periodic statewide[4] redrawing of political lines to issuance of the decennial census.

Even setting aside the hints provided by Article III, Section 28, the state in 2003 was not operating under any "reasonably conceived plan" for periodic readjustment of its congressional lines. It was responding to nothing more than the sudden political opportunity offered by a unique confluence of events: the historic ascension by the Texas Republican Party to controlling political power in the legislative and executive branches of state government; a political decision to dispense with the traditional super-majority two-thirds rule in the state Senate for congressional redistricting; sophisticated computer software to aid

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[4] Historically, curative redistricting in response to judicial invalidations has not been statewide. They are pinpointed, localized efforts in response either to a specific legal fault determined by the courts or to minor, technical political concerns. The 2003 redistricting, of course, was neither curative nor localized.

rapid, carefully calibrated line-drawing; and unparalleled intrusion into the process by national congressional figures.

All of this does not add up to compliance with the ground rules that *Reynolds v. Sims* laid down for states to cloak themselves with the protective fiction of inter-census population stability. Unless mere political opportunity fits the bill, the state plainly was not operating under a "reasonably conceived plan" for periodic adjustment of congressional lines. It certainly has not suggested one in its briefing to this Court.

Lacking such a plan, the rationale of *Reynolds v. Sims* for protecting the state in this instance from responding to the constitutional command of one person, one vote as it changed its congressional lines disappears. Once the state uncoupled congressional redistricting from issuance of the decennial census, in abandonment of the only apparent rational plan for periodic redistricting (that is, once a decade in the absence of judicial invalidation), it lost the ability to use the census as a safe harbor.[5]

Ultimately, the state's "safe harbor" defense to the equal population challenge rests on an accusation of empty formalism. In step with the two-member majority in the district court decision on remand, it derides the equal population rule urged here, claiming it would result in Plan 1374C's replacement with Plan 1151C, with no

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[5] The Constitution does not *require* states to use stale census numbers. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (state legislative case, explaining that the Equal Protection Clause "does not require the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured").

improvement in population equality. State Br. at 62. It is the state's position, though, that rests on formalistic rules.

The state seeks a rule that lets it rely on numbers it knows are wrong to satisfy a fundamental constitutional command. Speaking practically, the state's own chief Senate line-drawer called this "silly," but the state nonetheless insists that satisfaction of the equal population rule can be an utterly empty gesture, of only formalistic significance. Then, in further defense of the safe harbor rule it seeks, the state posits that "[t]here is simply no difference – in terms of *population equality* – between two maps based on when they were drawn." City Br. at 62. This statement lacks any factual basis whatever in the record. By its own voluntary undertaking, and its indifference to contemporary population realities, the state has created a factual vacuum about comparative compliance with equal population rules. Again, in a factually empty gesture of only rhetorical significance, the party with the constitutional obligation of meeting the requirement of Article I, Section 2, defends itself by asking the Court to hazard a guess that the state plan currently is no worse than the court-devised plan.

The Court should re-invigorate the one person, one vote rule, investing it with a practical application and bite that both critics and defenders claim have been lost over time. The state's invitation to reduce it to a mere formality should be rebuffed.

Two of the leading opinions on the equal population doctrine reveal on close reading a principle that tends to be overlooked. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court explains that the state bears the burden of justifying variations among the districts and that the

"as nearly as practicable standard" rejects the idea of fixed numerical standards. *Id.* at 530-31. Then, in *Karcher v. Daggett*, 462 U.S. 725 (1982), the Court explains that it is not establishing an acceptable *de minimis* level of population differences for congressional districts because doing so would tend to create a floor for legislative efforts at equality. *Id.* at 731.

In short, the Court has rejected *per se* rules which excuse population variances. *See Karcher*, 462 U.S. at 731. Driving this rejection is the understanding that *per se* rules would provide politically knowledgeable legislators an opportunity to operate under the *per se* radar screen to subtly undermine the fundamental equality principle. This principle explains the outcome in the district court case that this Court summarily affirmed in *Cox v. Larios*, 542 U.S. 947 (2004), where the 10% population variation rule that had been treated as a "rule of thumb" was held *not* to be a *per se* rule of equality. Fundamentally in this case, Texas is inviting the Court to adopt a *per se* rule: that the decennial census is *always* sufficient to satisfy the equal population principle. This is contrary to what the Court has done throughout the modern era of redistricting jurisprudence, and the state's invitation should be declined.

II. Given the availability to the state of the option of a special statewide census under 13 U.S.C. § 196, it is clear that the equal population rule sought here is not a covert attempt to rigidify the Constitution and establish a *per se* rule against voluntary mid-cycle redistricting.

Seeking to diminish the equal population rule sought by the Travis County Appellants into an insignificant subcategory of the broader mid-decade redistricting issues

raised by others, the state characterizes the argument as one about timing and the authority of the legislature, designed to block mid-cycle redistricting efforts. State Br. at 57 n.75, 58, 61.[6] This is a mis-characterization.

The state had, and has, an option available to it that permits the development of official census data that can be used for statewide redistricting. Under 13 U.S.C. § 196, Texas may contract for the Secretary of Commerce to conduct a "special census[]" on subjects covered by Title 13 of the United States Code. The statute specifically provides that the results of this special census "shall be designated 'Official Census Statistics'" that "may be used in the manner provided by applicable law."

Through this special census mechanism, Congress has made available to states that wish to voluntarily undertake mid-cycle redistricting a way to obtain contemporary data on population distributions in the state. Thus, if the Texas legislature in 2003 wanted to redistrict its congressional seats to correct real or perceived past gerrymanders, or if the Louisiana legislature wants in 2006 to redistrict its congressional districts to account for the massive population displacement caused by Hurricane Katrina, they have an option available that lets them also take into constitutional account the current reality of population dispersal.

This route to obtaining verified, accurate population counts is voluntary to be sure, but so would be the decision in the first instance to undertake the off-cycle line-drawing effort. If the redistricting effort is important

[6] *See also* Benkiser Br. at 4 ("effort to impose a *de facto* ban on mid-decade redistricting").

enough to undertake as a matter of state policy, then there is no reason that the constitutional imperative of equal population should be in a subsidiary position. While Article I, section 4, of the Constitution may invest state legislatures with the authority to legislate on the time, place, and manner of congressional elections, Article I, section 2, of that same Constitution imposes the overarching requirement that those legislatures honor the equal population rule when they do so. The special census statute provides the vehicle that lets the state legislature meet its constitutional obligation even as it exercises its constitutional prerogative. The state simply disregards this statutory option, both through its indifference when it decided to undertake the re-redistricting in 2003 and in its brief.

It must be emphasized that the option offered by § 196 is not a mandate. States are not obligated to contract for these special censuses and, therefore, their availability cannot be used as a basis for *forcing* mid-cycle redistricting under the one person, one vote rule. Congress has been careful not to create such a situation for the states. *See, e.g.*, 13 U.S.C. § 141(d) (compelling mid-decade federal census estimates but expressly forbidding their use in redistricting).

But, if a state legislature feels sufficiently compelled to voluntarily undertake the congressional redistricting task, § 196 offers a choice. Either do the job right in terms of the constitutional obligation to satisfy the equal population principle, or don't undertake the task at all.

With a congressional plan valid for the decade in hand, the state was not under the judicial gun in 2003 to act precipitously. It had time to consider whether undertaking the redistricting task to satisfy its policy concerns